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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 TRAVIS WAYNE BERRY,) Case No. CV 16-0554-RGK (JPR)
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12) Petitioner,)
13)
14) v.) ORDER ACCEPTING FINDINGS AND
15) RECOMMENDATIONS OF U.S.
16) MAGISTRATE JUDGE
17)
18) W.L. MONTGOMERY, Warden,)
19)
20) Respondent.)
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16 The Court has reviewed the Petition, records on file, and
17 Report and Recommendation of U.S. Magistrate Judge. See 28
18 U.S.C. § 636. On March 9, 2017, Petitioner filed objections to
19 the R. & R. He primarily repeats, summarizes, or expands upon
20 arguments in the Petition and his opposition to the motion to
21 dismiss. Two objections require brief discussion, however.

22 First, as the Magistrate Judge pointed out in the R. & R.,
23 claims raised in a second or successive petition that were
24 previously presented in an earlier "application" must be
25 dismissed under § 2244(b)(1) even if that earlier petition was
26 dismissed as untimely. (See R. & R. at 21-25.) She explained
27 that a claim was "previously presented" if the "basic thrust or
28 gravamen of the legal claim is the same," even if a petitioner

1 supports it with new or different legal arguments or factual
2 allegations. (See id. at 21 (citing Babbitt v. Woodford, 177
3 F.3d 744, 746 (9th Cir. 1999) (per curiam).)

4 Petitioner contends that his ineffective-assistance subclaim
5 concerning the cardboard box is not barred by § 2244(b)(1).
6 (Objs. at 1-8.) He argues, as he did in his opposition to the
7 motion to dismiss, that because his earlier petition was
8 dismissed as untimely it was not adjudicated "on the merits."
9 (See id. at 4, 7.) But that is not the law. See McNabb v.
10 Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that petition
11 is second or successive even when first petition was denied as
12 untimely); see also Woods v. Hedgepeth, No. 2:11-CV-3250 LKK DAD,
13 2013 WL 593712, at *4-5 (E.D. Cal. Feb. 14, 2013) (dismissing as
14 second or successive ineffective-assistance-of-counsel claim
15 supported by new factual allegations because it was previously
16 presented in earlier petition that was denied as untimely). He
17 argues that "new evidence demonstrates how counsel was
18 ineffective and what counsel would have found had he properly
19 investigated." (Objs. at 7-8.) But as the Magistrate Judge
20 explained in the R. & R., such attempts to further develop the
21 same ineffective-assistance claim bring it squarely within
22 Babbitt's "basic thrust or gravamen" prohibition: the claim is
23 still that his counsel was ineffective because he failed to
24 adequately investigate the cardboard box. (See R. & R. at 25);
25 see also Woods, 2013 WL 593712, at *4-5 (finding ineffective-
26 assistance claim from first habeas petition – that counsel failed
27 to adequately investigate and interview witnesses, prepare for
28 trial, and present evidence about mistaken identity –

1 "essentially the same" as claim presented in second petition,
2 which provided specific name of potential witness counsel should
3 have called).

4 Petitioner's argument based on Martinez v. Ryan, 566 U.S. 1,
5 11 (2012) (holding that procedural default does not bar federal
6 habeas court from hearing "substantial claim" of ineffective
7 assistance of trial counsel in certain circumstances) (Objs. at
8 2-3), is not without some surface appeal, but it cannot prevail
9 given the plain, unequivocal language of § 2244(b)(1): "A claim
10 presented in a second or successive habeas corpus application
11 under section 2254 that was presented in a prior application
12 shall be dismissed."


13 Second, Petitioner argues that he has met the actual-
14 innocence standard of § 2244(b)(2)(B)(ii). (Objs. at 13-24.)
15 The cases he cites to support his argument, Killian v. Poole, 282
16 F.3d 1204 (9th Cir. 2002), and Hall v. Dir. of Corr., 343 F.3d
17 976 (9th Cir. 2003) (per curiam), are both distinguishable. In
18 Killian, the district court determined that the prosecution's
19 main witness had committed perjury at trial, and the Ninth
20 Circuit found that "one cannot reasonably deny" that the witness
21 had lied. See 282 F.3d at 1208. Here, the state court conducted
22 an evidentiary hearing on the question of Pearce's recantation
23 and found it untrustworthy; this Court does not find that factual
24 determination objectively unreasonable.

25 In Hall, some of the evidence used at trial against the
26 petitioner was physical, and a state trial judge determined that
27 it had been doctored to incriminate the petitioner. See 343 F.3d
28 at 980-81. Without that evidence, the petitioner's unreliable

1 confession could not alone support the conviction. Id. at 983-
2 84. Here, no court found that Pearce's trial testimony that
3 Petitioner participated in the crimes was false. Further,
4 Petitioner's claims that Pearce was untrustworthy (see Objs. at
5 14-15) and that there was no testimony at trial about "what the
6 box was for" (id. at 21) do not prove Petitioner's innocence; the
7 question of Pearce's trustworthiness was probed on cross-
8 examination and argued to the jury, his trustworthiness at the
9 evidentiary hearing was properly observed and considered by the
10 state court, and evidence that the cardboard box had contained a
11 towing kit and that a towing kit was provided with the victims'
12 rental car, in which their bodies were found, would have
13 strengthened the prosecution's case, not Petitioner's.

14 Having reviewed de novo those portions of the R. & R. to
15 which objections were filed, the Court accepts the findings and
16 recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED
17 that Respondent's motion to dismiss is granted, the Petition is
18 denied, and Judgment be entered dismissing this action.

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20 DATED: April 12, 2017



R. GARY KLAUSNER
U.S. DISTRICT JUDGE